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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY & CONSTRUCTION COURT (QBD)

No. HT-2018-000349/375

[2019] EWHC 3139 (TCC)

Rolls Building
Fetter Lane
London, EC4A 1NL

Wednesday, 9 January 2019

Before:

MR JUSTICE WAKSMAN

B E T W E E N :

DRIVE (EDGWARE) LTD — Claimant

- and -

S & T (UK) LTD — Defendant

MR P. CLARKE (instructed by Messrs Fletcher Day) appeared on behalf of the Claimant.

MR J. RAYNES (instructed by Steptoe & Johnson UK LLP) appeared on behalf of the Defendant.

J U D G M E N T

MR JUSTICE WAKSMAN:

1 I have effectively two cross applications before me. The first is an application by the party that I shall refer to as the claimant (although it is a Part 8 defendant), a contractor who here was acting as a subcontractor called Drive Edgware Limited to which I shall refer as Drive. Its application is to enforce a decision of the adjudicator dated 25 October 2018 in which the adjudicator directed S & T (UK) Limited, a contractor and the Part 8 claimant here, to pay to Drive £382,936.85 together with VAT and interest. The adjudicator also held that S & T should pay for the adjudicator's fees of around £6750 plus VAT which in the meantime Drive has paid.

2 The underlying subcontract concerned works being carried out by S & T, which included the provision of leisure facilities at the residential property including, for example, a swimming pool, and this subcontractor, Drive, was contracted to supply enabling, demolition and substructure works. Drive began those works on 1 August and ceased them on or before 29 October 2017. As I shall recount in a little more detail hereafter, there were a series of applications for payment which in substance all related to the same works, those being the works for which Drive contends it had not been paid before it left the site and which were made in the form of monthly applications for payments for the simple reason that that is what the contract provided for.

3 The subject matter of the claim before the adjudicator was an application for payment which was sent by Drive by email to S & T on 20 July. Although the sum claimed varied slightly from prior sums claimed in January and February, and that was no more than modifications to or revisions of the sums claimed, they all still related to the same unpaid for works. The subcontract contains the familiar provisions concerning the right of a contractor to payment following the issue of a valid payment notice where no Payless Notice payment notice has been served in time by the other party.

4 So far as the July payment was concerned, there was no Payless Notice and, accordingly, under the terms of the contract, Drive became entitled to payment, assuming, that is, that the application itself was valid. That is what led to the adjudication.

5 In the adjudication the point was taken, and unsurprisingly, in the light of the nature of the claim for payment, that the payment application made by Drive was not itself valid. The adjudicator in his detailed decision summarised the detail of those points. At para.41 of his decision he said that it is a matter of whether Drive had submitted a valid application. The reasons why it was said it was not valid were specific.

6 First of all, as recounted in para.42, the application was tainted by fraud. The allegation that was made was that the payment application email was sent to the project surveyor for the project, Mr Harris, at his S & T email address but he had left in late May, i.e., prior to the making of the payment application, and Drive were well aware of that; and that all of this was a device effectively to try and bring about a situation where, because it was sent to someone who no longer worked for S & T, there might be a greater chance of the payment notice not being dealt with which would then give Drive the right to a payment which it could then take speedily to the adjudicator. Very wisely, in my judgment, S & T later abandoned this entirely speculative suggestion although it appears that some residual doubts still appear to be harboured by those at S & T - but, in any event, it no longer arises.

7 There were some other points raised, in particular that the application did not pass muster and in circumstances where in fact the project surveyor had left, and so it would be wrong to treat it as a valid application, and also there were other substantive defects with it.

8 Finally, the third point made, as set out in para.43 of the adjudicator's decision, is that the payment should not be awarded because it would leave Drive with a significant overpayment and thereby obtain a windfall because on a true analysis of the work done and the monies due in any form of subsequent final accounting, it would be shown, says S & T, that Drive would not be entitled to as much as it has claimed.

9 There rested the position before the adjudicator and he rejected all of those defences, hence his decision in favour of Drive. However, since the making of that decision and intimated to Drive by an email from, I think, the project manager acting for S & T, a new point arose and that was that there was a quite separate reason why the application was invalid - that is because it was sent to the wrong email address for contractual purposes. It was contended that by an email sent on 26 January 2018, to which I shall refer as the January email, there was a contractually binding change so that from then on any payment application had to be made *inter alia* to a new designated email address which was scorders@stcgroups.com.

10 Since the application was not made to that address but, rather, consistently with previous applications, to the email address of Mr Harris, the payment application was defective and invalid. If that is right, there could be no basis for an adjudication decision in favour of Drive even if, as is manifestly the case, the point had never been taken before the adjudicator and even if, as appears to be S & T's position, the January email was not even discovered internally until shortly after the adjudication decision had been communicated.

11 That January email point, if I can describe it thus, lies at the heart of the second application before me which is a Part 8 claim brought by S & T for appropriate declaratory relief to the effect, first, that as a matter of substance the application for payment was invalid and, secondly, although the point was not before him, that the adjudicator was wrong to find that it was. Both parties recognising that the only point which could be raised against the enforcement of the adjudicator's decision was the January email point, they agreed that both the application to enforce the adjudicator's decision and the Part 8 claim should be heard together.

12 At one stage having read the submissions of Mr Clarke for Drive, it appeared as if he was suggesting that even if S & T was right in its Part 8 claim, it was debarred in some way from advancing it to prevent payment under the adjudication because the point had not been raised in the adjudication. However, as he helpfully clarified at the beginning of his submissions, he was not saying that. He accepted that this was a case where both sides had agreed that both matters should be dealt with together. He further agreed that if Drive lost on the Part 8 so that the payment application was invalid, that would be a bar at least to the payment of the principal sum which the adjudicator had decided was due by S & T to Drive.

13 There could be residual questions about the payment of interest or costs of the adjudicator's fees which would turn the somewhat unusual circumstances here where the January email point had not even been taken before the adjudicator; but they could properly be described as ancillary. For that reason, the point which Mr Clarke had described as issue 2 in his skeleton, as a matter of substance falls away and everything turns on whether S & T is right or wrong in its Part 8 claim.

14 It is also accepted that even in relation to the Part 8 claim we are here firmly in temporarily-binding territory which is to say that if the Part 8 claim was lost and, therefore, there was no bar to the enforcement of adjudication award and the money had to be repaid, S & T would still in the usual way have the right to challenge the substantive entitlement to that amount which it has done in proceedings to be brought hereafter.

15 Conversely, if S & T was right, and the payment application was invalid, that would not debar Drive forever from claiming the monies which it said were due. It would simply mean that that particular payment application was invalid and could not have the particular consequences in terms of when payments should be made which Drive contended it did. In other words, and without in anyway underestimating the importance of cash flow, which is what the adjudication regime is all about, this is a timing point.

16 So far as the evidence before me is concerned, there have been two witness statements from Mr Docherty, who is the solicitor for Drive, and there has been one witness statement on behalf of S & T which has been made by Mr Cleghorn who is its commercial director.

17 Before turning to the January email itself, let me just say a little more by way of background. There had been a number of project surveyors dealing with this job while Drive had been involved in it and at one stage Drive was requested to send the applications for payment to a new person at S & T because that new person was the new project surveyor and the latest project surveyor so far as Drive was aware was Mr Harris. As I have indicated, since Drive had left the site by late 2017, the monthly payment applications it made thereafter were all for the same works.

18 Let me now just deal with the relevant contractual terms other than those dealing with payment notices and Payless Notices because that is all common ground so that if the payment application was valid, then there was a default in not responding to it on the part of S & T and if it was not valid, it would not give rise to a payment obligation at that particular time.

19 The subcontract particulars state at para.5.2 that there were monthly payment applications to be made but then at clause 12 it stated that under notices, 12.1 for the contractor, that is to say S & T, is to be addressed to "via email to the S & T project surveyor." At one stage Mr. Raynes for S & T prayed in aid the fact that there had already been some changes in addressee without any particular problem and that is where the project surveyor had changed. Nothing, it seems to me, turns on that. That is wholly consistent with the terms of 12.1 which unsurprisingly do not identify any particular individual as the project surveyor because of course they could change. What is provided for is for the S & T project surveyor, and I interpolate for the time being or known to be such for the time being.

20 One then comes to clause 1A.0, Fair dealing and team working, the contractor and subcontractor shall deal fairly in good faith under mutual cooperation with one another."

21 Then in clause 13, and it is necessary here to read out all of it, under the heading "Comply with directions":

> "The subcontractor shall comply with all reasonable directions issued by the contractor within the timescale detailed on the directions. If the subcontractor fails to comply with the directions within the timescale stipulated thereon, the contractor may implement whatever action is necessary to ensure compliance with the direction. If no timescale is stipulated thereon, the timescale shall be within a reasonable period

> from the date of issue by the contractor. The subcontractor shall use best endeavours to ensure such period does not delay the contractor's on site progress. Any costs incurred by the contractor ensuring compliance with or execution of the work required by the directions, including but not necessarily limited to the employment of additional resources, may be set off against monies due or that may become due to the subcontractor."

I will refer to the meaning and effect of those provisions a little later in this judgment.

22 I, therefore, turn to the January email itself and, first of all, to its language and how it should be construed. It is sent from Sarah Rainbow, a project administrator, and although it does not appear from some of the copies of that email in the papers before me, I am prepared to accept that if read it would appear to be from sarahrainbow@stcgroups.com. It says this:

> "Dear all, with immediate effect please issue site instructions signed by the commercial manager and project manager on every live project to replace the current nominated address for subcontracts, applications for payment. The instruction is to read as follows:"

23 There are then no inverted commas but clearly that is the sense of it because it is meant to be the text of the instruction:

> "Please issue all future applications for payment to the email address below and cc in the relevant QS for the project. Any applications issued to any other email address/persons will not be recognised. Scheduled application dates within the order are still applicable, sc-orders@stcgroups.com. If you have any queries please do not hesitate to contact Ashlyn McGee ..."

The email of Ashlyn McGee is then given.

24 Mr Cleghorn explained the thinking behind the decision that there should now be a specific but a generic SC orders email address where application should be made as well as being copied to the relevant quantity surveyor. What he says in short is that particularly with the importance of dealing promptly with payment notices, because of the sort of consequences that arose here in fact, it was thought to be sensible to have one generic email address which would also mean that the management or directors of STC would be able to see any particular payment application and not just the QS and that would give them an opportunity to look at the payment application timeously to decide whether it was in order or not. There is at this stage no material before me to gainsay that that is what they thought they were doing and why they wanted to do it.

25 Before looking at the language of the email I need to explain what happened thereafter. The email address did not have any email address in line 2, that is to say, where one would normally find the addressee or the principal addressee. That was simply blank and what one then had were the externally viewable addresses that were copied in and in this particular case there were six individuals all at STC including Mr James Harris who was the project surveyor on this particular job at the time. In fact, however, there were a large number of other persons who were blind copied into that email. They appear to consist essentially of a number of subcontractors with whom STC were dealing at the time.

26 Within that blind copy list were the email address is of two individuals who worked at Drive. The first was Paul Tobin, a director, and the second was Colin Whelan, although his email address simply says Colin, who was a site manager at Drive.

27 The evidence from Drive is to the effect that this email was not seen or read at the time or indeed at any stage until its existence was drawn to its attention by STC on 5 November 2018. The reason for that was this, having been told about it, Drive investigated and found that it had indeed arrived but had gone into the junk folders of both Mr Tobin and Mr Whelan. That this should happen is perhaps not entirely surprising since it was not an email directly addressed to them as recipients and where there were a large number of blind copy recipients certainly totalling something like 30 in number.

28 Mr Docherty in his first witness statement, which includes evidence given on instructions which he believes to be true, stated at para.17(a) that when it was sent to Mr Tobin and Mr Whelan, it was never received by them at the time and it was only --- and it says "delivered" but I agree that in the context, this must be an error and it should have said "discovered" in a junk folder on 5 November following receipt of S & T (UK)'s email. It was not sent Drive's project manager. That is the right way to look at that evidence as backed up by (b). It is hardly surprising that the email was sent to the junk folder on 26 January considering who the sender was when that was someone who they had never heard of before.

29 An additional point was taken which I do not need to be troubled with because I am not sure it goes anywhere, which is that when this email was first investigated, Ms Rainbow's email address had changed into a large series of letters and numbers and symbols but I am told that that is because she herself had left STC and because her email account was deleted that is the sort of thing you get in its place if you then try and look up who the sender was. So that aspect does not concern me and is not relevant. That on the facts is where matters stood so far as the claimant's knowledge about all of this is concerned.

30 I then turn to the language of the email and what it purports to do and not do. Here there is a divergence of view between Drive, on the one hand, and STC, on the other. I have already set out what it says. It seems to me that read fairly and objectively this was an instruction given by Ms Rainbow internally to others at S & T that in respect of ongoing projects which involved S & T, a site instruction should be issued by the relevant S & T commercial manager and project manager to the relevant subcontractor. The relevant subcontractor would of course be the party seeking from time to time payment from S & T by email and that the site instruction which those at S & T should send out to the subcontractors was the bit which begins "please issue" and ends with "ashlynmcgee@stcgroups.com." In other words, that email contemplated that some further and more formal instruction would be given to all the subcontractors. That seems to me to be commercially wholly sensible.

31 Mr Raynes, however, says that that cannot be right. He says that this email in its entirety is a direct instruction to the subcontractors and it is a subcontractor who must then issue site instructions signed by their commercial manager and their project manager on every live project in the terms which are there indicated. One reason why he says that is because it would be odd for the instruction coming from STC if that is what it was hereafter to be called a site instruction. I do not think anything in particular turns on that. I do not think that because the word "site instruction" is used it means it could not possibly be something that comes from STC concerning the question of addresses in this context although the words used "site instruction" would perhaps be somewhat infelicitous.

32 I do not agree with Mr Raynes that that is a proper and fair way to read this email. One of the reasons why it is not, apart from what language says as far as I am concerned, is that this is not even an instruction which is issued on the face of it directly to any particular subcontractors. All of the subcontractors are simply blind copied in. I can understand that where there had to be a communication to all subcontractors, there would be a reason for in some way doing blind copies so that one subcontractor did not know which other subcontractors might be dealing with S & T, but it does not seem to me that that makes any difference here because if the intention was directly to notify and instruct every subcontractor, then all that required was a separate email to every subcontractor which would hardly take much longer than the email in question since in any event all of the relevant email addresses had to be put in.

33 Therefore, it seems to me that both commercially and linguistically, to see this email as constituting in its entirety a direct instruction to all the subcontractors with nothing further to come simply does not fit a language, and it does not fit well with the notion of only blind-copying the subcontractors in. The rhetorical question might then be asked, why were they copied in, and the answer to that is pretty obvious I would have thought, which is that they are copied in because they are told that a change is coming and it gives them advance notice of what is to come hereafter.

34 There is no evidence at all from S & T about the particular drafting of this email or in fact why it should be sent in this way and that is perhaps unsurprising on the facts of this case for two reasons; first of all, Ms Rainbow has herself left and, secondly, on the facts before me nothing actually happened in relation to this email. As I shall explain hereafter, when the next chronological payment application was made, it was made by Drive to S & T in the usual way as far as it was concerned to Mr Harris and it was responded to. Admittedly, it was not paid, and that is because S & T were objecting to making any further payment but a formal Payless Notice was sent out and no point was taken.

35 Secondly, there was in fact no subsequent instruction of any kind. There is simply no evidence at all from S & T about why that might have been the case or any detail about the nature of this email at all.

36 If that is right as a matter of analysis, that is the end of a Part 8 claim because the intended and contemplated objectively subsequent site instruction was never given and, therefore, there was no implementation of the means by which the change of address was to be effected.

37 It is worth at this point just recounting for the record the other payment applications around the time just to explain what S & T's reactions were or were not. The application for the January payment was made, I think, on or around 18 January but on any view it was shortly before the 26 January email. However, it was responded to in a Payless Notice that was sent on 5 February and that Payless Notice made no comment at all about the fact that on S & T's case, Drive's application was not in conformity to a previously issued instruction, they knew nothing about that at all.

38 The second aspect of it is that on 14 February, Drive made an application in respect of the month of February and that was sent to Mr Harris again. That elicited a Payless Notice which is dated 18 March, sent under cover of an email of 20 March, which again did not take any point about the fact that it had been addressed again to Mr James Harris at his email address and no point was taken about the use of that email address and of course in the context of this case, that was the only way in which Drive had sought payment except on

the earlier occasions when there had been a different project surveyor but it was still sent to the email address of the project surveyor.

39 I will deal with two other subsidiary points which have arisen in relation to the email. First of all, Mr Clarke submitted very much as a subsidiary point that in any event on a true reading of what the instruction which was meant to be coming or, on S & T's case had already come, was that it was only effectively that Drive should present their payment application either to the new email address or to the relevant QS. I do not accept that submission. If it was an instruction, it seems to me to be plain to be saying that it is to go to the "sc-orders" email address and copied in to the relevant QS but the primary recipient on that view would be "sc-orders."

40 The second subsidiary point I will deal with hereafter but it is to the effect that if you are to have a notice, then for the notice to be effective as being a notice to someone, then that someone must be a direct recipient of the email rather than someone who is blind copied in. I consider that there is force in that submission though it is not essential for my decision. The fact that none of the subcontractors were in there as direct recipients is of course another reason for viewing the email properly as an instruction internally to those at S & T to produce the later site instruction which in fact never came.

41 I have said for those reasons that that is in fact the end of the Part 8 claim. In fact the difficulties with that claim go very much further. I advert to them now because if I were wrong and if the email could somehow be construed directly as an instruction to Drive, then since it was received (albeit it appears in junk but not read), the fact that it had not been read at the time would not provide a reason for saying that it was not a notice if otherwise valid. Thus I deal with alternative reasons for dismissing the Part 8 claim.

42 On one view of what I have read of the Part 8 claim form and the skeleton submissions, it seems to me that S & T might have been submitting that this was a contractual variation which would of course require offer and acceptance. On the facts of this case, as I have already outlined, that would be entirely hopeless and Mr Raynes did not pursue the point if it had ever been a live one. Therefore, S & T's case had to be that in some way there were contractual provisions which allowed it unilaterally to change the address for the payment applications.

43 The first way in which this was put, though I think at the end of the day not the primary way, was to rely upon the fair dealing and team working clause. As I understood the argument today, it was that there must have been if not bad faith then a lack of fair dealing and a lack of mutual cooperation on the part of Drive because it should simply have followed the instruction. That rather ignores, first of all, the context here. The context here on the evidence is - and at this point whether it is read or not does seem to me to be important - if it had only gone into junk email and was not noted by Drive at the time and, moreover, was sent in circumstances where it was not even addressed directly to Drive and where there was not even any suggestion of a discussion about it or a request for it to act, it is extremely hard to see how in those circumstances the mere sending of an email and the terms in which it was sent and the fact that nothing changed on the part of Drive could possibly mean that it was acting in bad faith or unfairly. There was no invitation to discuss the matter or have a discussion about it at all and the point was never raised thereafter.

44 It is of course conceivable that if this was a matter that had been directly raised with Drive and the reasons given and there was some discussion about it, that if Drive had said that they simply were not prepared to do it, if there was no justification for that, that might be said to

be an example of a lack of mutual cooperation but there are two problems with that theoretical position. First of all, it is simply not what happened here and, second of all, it would not necessarily render valid the instruction that was sent. It would simply mean that there had been a breach of the mutual dealings obligation. That might have generated some mitigation, perhaps not, but it is quite impossible on the facts of this case to see how it can be said but there was a breach of that clause even if such breach would then render valid the instruction that was sent.

45 There is no injustice in that. S & T could easily have communicated directly with each of the subcontractors and raised all of this expressly; indeed from the evidence it appears that it was not actually very high on their agenda and I say that because they accepted notices in the same form before and they did not even become aware of this email until sometime after the adjudication.

46 That then deals with that particular clause. The alternative was to rely on clause 13.1 which I have recited in full. The difficulty with that is that I do not read clause 13 as dealing with anything other than, as it were, the day to day workings of what was going on on site. That is unsurprising because that is precisely the sort of thing where the contractor and the subcontractor would have to be working together and if on a particular point of the works the contractor gave a direction which was reasonable, then one can understand why there is an obligation to comply with it.

47 Mr Raynes focused on the first sentence, "The subcontractor shall comply with all reasonable directions issued by the contractor within the timescale detailed on the directions." Of course that may appear to be open-ended but it is impossible to look at it in isolation. One has to read it with the rest of the clause which makes it plain that it is all about what is going on on site.

48 Secondly, the first sentence itself is not as open-ended as might appear because it says to comply with all reasonable directions within the timescale detailed on a direction and there was no timescale here in relation to this at all. That rather proves a point that what this is about is where something has got to be done and it has got to be done obviously within a certain period of time. This is all wholly inappropriate to some kind of notice which is dealing with change of a contractual term. Admittedly, not a substantive term concerning the work to be done but a payment to be made, but a term of the contract, nonetheless.

49 Therefore, for that reason I do not accept that the email can be construed as a reasonable direction within clause 13 so as to validate the email if, contrary to my first finding, it essentially bears the meaning contended for by S & T. Therefore, the fact that on this analysis the email may be construed as a notice and that it was sent to the right person, although unread, at Drive, namely a director, for the purposes of clause 12.2 is nothing to the point. That is the mere fact that it was sent to the right person does not help S & T since it involves a change to the terms of clause 12.1 unless it is a variation, which is not contended for, or unless it is compelled by the operation of the two contractual terms to which I have referred but in fact they are inapplicable.

50 As an additional point, and this is what I prefaced earlier on, I accept that, moreover, if it is going to be a notice it should look like a notice and be addressed like a notice. This email was not. It did not have any recipient there at all and a party who is to be saddled with the receipt of a notice, provided it is sent in the right way, is entitled to see something which at least purports to be addressed directly to it and this email was not. For that additional

reason, I would not in fact have found that it was a notice at all but, as I say, that is not necessarily for my decision.

51 That really leaves a final point which, in the light of my decision that I have already reached is academic, but it is a point made by Mr Clarke which is an estoppel point; that is to say that in any event even if the January email would otherwise have been a binding instruction to send the payment applications elsewhere, this would make no difference because of the conduct of S & T after the January email was sent, both in terms of dealing with the earlier application for payment and in terms of the Payless Notice for the January payment claim, which itself was served after 26 January, and the dealing with the subsequent application for payment in respect of February and the response to that and, therefore, the contention is that that was effectively a representation or an agreed way of operating to use, if I can put it in this way, the existing method of notifying a payment application which would have the effect of now preventing S & T from contending otherwise and in circumstances where, unsurprisingly, it is said that they relied upon that because if they had been told to make the payment to another email address a different view may have been taken.

52 Mr Raynes, however, says as Edwards-Stuart J said that this is a case where one swallow does not make a summer. There is not enough inconsistent dealing following the sending of the January email to estop S & T from taking the point but I do not agree with that. The case that he relies upon which is the decision of Edwards-Stuart J in *Leeds City Council v Wakeham* was a rather different set of circumstances. What was said in this case was that there had been a course of conduct where LCC had agreed to accept multiple applications that were made three to four business days after the contractual valuation date. What had happened here was that the application in question was not actually a late application but it was a premature application. It should not have been made until after it was made. LCC had waived the irregularity by paying it but he did not consider that that would amount to any form of implied representation; it would waive a future similar irregularity in the future.

53 But this case is different because what one has here is a course of conduct in terms of sending the payment applications which had been made consistently from the beginning through to the end; that is by addressing them to the project surveyor and they had all been dealt with without exception on that basis both before in fact and after the January email. It was important because if the suggestion was going to be that the payment application here was invalid because it was sent to the wrong email address which could be rectified, whether it was a question of obligation or not if Drive chose to do so, that was a matter of some importance and so this is a case of where there was a consistent practice which in fact was completely in accordance with the contract all the way through and while there was an instruction to do something different, even if it was contractually binding, it did not actually interrupt that practice at all.

54 I add to that of course the fact that even the adjudication was not conducted on the basis that there was a January email and that that was a reason why the payment instruction itself was invalid. Accordingly, had it been necessary for me to decide (and it is not), I would have come to the view in addition that S & T would be estopped from relying on the point if they otherwise had a point about the contractual effect of the January email. However, as I have indicated, strictly speaking, this does not arise. For all of those reasons, therefore, this Part 8 claim must, in my view, fail.

55 I just make two further points. The fraud allegation is not pursued and so it is not relevant for me to say anything about it other than at some point it was being suggested that maybe Drive did know something about the departure of Mr Harris but it has to be remembered of

course that Drive were not on site at the time of these applications and Mr Harris had apparently left site in late May but I am certainly not prepared to find, if I was going to be requested to find on hearing of this kind, that there was any knowledge on the part of Drive that Mr Harris had left by the time it sent the application and of course there is no positive evidence led now by S & T to the effect that they were.

56 The second postscript observation I want to make is this, that it might be thought that this result is in some way unfair to S & T because it is in some way a technical point, notwithstanding that I am not making any final determination about the money which overall is payable to Drive but I do not accept that. If this really was a case of changing the way in which the applications for payment should have been made, it was open to S & T to do so far more directly with Drive in the way that I have indicated and if it took the matter seriously it could have raised the point even after the February payment application had been made.

57 The other thing it could have done, which might have prompted some consideration as to what was happening going forward, was to tell Drive directly that Mr Harris had now left but none of those things were done.

58 Accordingly, as I have indicated, for the reasons I have given which, if they need any clarification hereafter since this is an extempore judgment, I reserve the right to do so, but for those reasons the Part 8 claim must fail. That being the only basis on which the application to enforce the adjudicator's decision is resisted, that enforcement must now take place and I will hear counsel on any consequential matters.

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